IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

CWP No.: 524 of 2006.

Decided on: 20.06.2007.

Shri Sarwan Kumar … Petitioner.

Versus

The Secretary, H.P.S.E.B. and others. … Respondents.

Coram:

The Hon'ble Mr. Justice Rajiv Sharma, J.

Whether approved for reporting?[1] *Yes.*

For the petitioner: Mr. Rahul Mahajan, Advocate.

For Respondents No.1 & 2: Mr. Shrawan Dogra, Advocate.

Rajiv Sharma, Judge:

This petition arises out of the award dated 23.3.2006 passed by the learned H.P. Industrial Tribunal-cum-Labour Court, Dharamshala in reference No.119/2003.

The brief facts necessary for the adjudication of this petition are that the State Government had made the following reference to the H.P. Industrial Tribunal-cum-Labour Court, Dharamshala:-

> ***"Whether the action of Assistant Resident Engineer, Bassi Power House, Jogindernagar, Mandi, HP in terminating the services of Shri Sarwan Kumar Son***

Whether reporters of local papers may be allowed to see the judgment? Yes,

of Shri Kanshi Ram Daily wager Beldar on 26.3.1997 by not complying with the provisions of Section 25G, 25-H-B(1) and 14(2) of HPSEB Standing Order by retaining the juniors in the job is justified or not? If not, then to what benefits and compensation Shri Sarwan Kumar worker is entitled to?"

In sequel to the reference the petitioner/workman had filed statement of claim and the respondent-Board/employer had also filed reply to the same. The case set-up by the workman in the statement of claim was that he was engaged by the Board with effect from 25.12.1994 and continuously worked with the respondent-Board till 25.3.1997. He had contended that he was retrenched without following the mandatory provisions of law and was not issued any notice at the time of his retrenchment with effect from 26.3.1997.

The case set-up by the employer before the Labour Court was that there was no industrial dispute and the reference could not be made in the year 2003 since the retrenchment, if any, was effected on 26th March, 1997. The learned H.P. Industrial Tribunal-cum-Labour Court had answered the award on 23.3.2006 in the negative on the sole ground of delay in raising the dispute.

Mr. Rahul Mahajan, Advocate appearing on behalf of the petitioner had strenuously argued that the award pronounced by the Labour Court, Dharamshala, dated 23.3.2006 is not sustainable in the eyes of law. On the other hand, Mr. Shrawan Dogra, Advocate appearing on behalf of the respondents had supported the award dated 23.3.2006.

In the present case, this Court is required to consider whether on the basis of present facts and circumstances of the case, the H.P. Industrial Tribunal-cum-Labour Court at Dharamshala could come to the conclusion that there was delay in raising the dispute or not.

The workman was engaged with effect from 25.12.1994 and was retrenched with effect from 26.3.1997. He served a demand notice on the employer through the Conciliation Officer-cum-Labour Officer, Mandi. The Conciliation Officer-cum-Labour Officer had sent a notice to the Executive Engineer, i.e. respondent No.2 on 2nd April, 1998 for conciliation proceedings. The workman had not pursued this remedy and had approached the learned H.P. State Administrative Tribunal by way of O.A. bearing No.1581/1999. It appears from the pleadings that the workman though had approached the H.P. State Administrative Tribunal by way of OA, but in the mean time had again approached the authorities concerned on the basis of which reference was made by the State Government on 25.4.2003. The workman had withdrawn the OA bearing No.1581/99 by seeking liberty to approach the Labour Court vide order dated 23.12.2004.

The position which emerges from the pleadings of the parties finally is that the workman had raised a demand pursuant to which conciliation proceedings were held. The workman had not pursued the same and had approached the learned H.P. State Tribunal by way of O.A. bearing No.1581/1999. The O.A. was permitted to be withdrawn on 23.12.2004. In all fairness, the

workman should have apprised the learned H.P. State Administrative Tribunal that a reference had already been made by the State Government to the Labour Court in year 2003 and on that basis the petition should have been withdrawn. The workman had sought the permission to withdraw the original application to enable him to approach the Labour Court. This act of the workman was not proper. The workman had been pursuing different remedies simultaneously by approaching the Labour Court during the pendency of the original application. It appears that the workman being a layman at the most has not been advised properly, but on that score alone, he could not be precluded from pursuing the matter before the Labour Court.

Admittedly, the matter has remained under litigation since March, 1998 when the petitioner had raised a demand and thereafter the Labour Court was seized of the matter. The learned H.P. Administrative Tribunal was also seized of the matter with effect from 1999 till 23rd December, 2004. In the mean time, the fresh demand was raised by the workman on the basis of which reference No.119/2003 was made. Consequently, it cannot be presumed that there was any delay in raising the demand in view of the above discussion.

The Labour Court has not taken into consideration the factum of the raising of demand vide notice dated 19th March, 1998 and the matter remaining pending with the learned H.P. State Administrative Tribunal. The State Government on the basis of the material placed before it had chosen to make a reference. The

reference made as quoted hereinabove was not assailed by the employer. The labour Court had come to a wrong conclusion that there was delay or laches in raising the dispute. The Labour Court was required to adjudicate upon the reference made on merits. The Labour Court at the most could consider the aspect of delay only for the purpose of moulding the relief.

The Hon'ble Supreme Court has held in **Shambu Nath Goyal v. Bank of Baroda, AIR 1978 SC 1088** that the Tribunal or Court cannot sit in appeal over the decision of the Government and come to a conclusion that there was no material before the Government. Their Lordships have held as under:-

> **"The reference in the case before us was made under S. 10 (1) which provides inter alia that where the appropriate Government is of opinion that any industrial dispute exists or is apprehended it may at any time by order in writing refer the matter for adjudication as therein mentioned. The power conferred by S. 10 (1) on the Government to refer the dispute can be exercised not only where an industrial dispute exists but when it is also apprehended. From the material placed before the Government, Government reaches an administrative decision whether there exists an industrial dispute or an industrial dispute is apprehended and in either event it can exercise its power under S. 10 (1) the Government is doing an administrative act and the fact that it has to form an opinion as to the factual existence of an industrial dispute as s preliminary step to the discharge of its function does not make it any the less administrative in character. The**

Court cannot therefore, canvass the order of reference closely to see if there was any material before the Government to support its conclusion, as if it was a judicial or quasi-judicial determination. No doubt it will be open to a party seeking to impugn the resulting award to show that what was referred by the Government was not an industrial dispute within the meaning of the Act, and that therefore, the Tribunal had no jurisdiction to make the award. But, if the dispute was an industrial dispute as defined in the Act, its factual existence and expediency of making a reference in the circumstances of a particular case are matters entirely for the Government to decide upon and it will not be competent for the Court to hold the reference bad and quash the proceedings for want of jurisdiction merely because in its opinion there was no material before the Government on which it could have come to an affirmative conclusion of those matters, (vide Madras State v. C.P. Sarathy, AIR 1953 SC 53). The Tribunal however, referred to the decision of this Court in Sindhu Resettlement Corporation Ltd. v. Industrial Tribunal, (1968) 1 Lab LJ 834: (AIR 1968 SC 529) in which this Court proceeded to ascertain whether there was in existence an industrial dispute at the date of reference, but the question whether in case of an apprehended dispute Government can make reference under S. 10 (1) was not examined. But that apart the question whether an industrial dispute exists at the date of reference is a question of fact to be determined on the material paced before the Tribunal with the cautions enunciated in C.P. Sarathy's case (supra). In the case before us, it

can be shown from the record accepted by the Tribunal itself that there was in existence a dispute which was legitimately referred by the Government to the Industrial Tribunal for adjudication. Undoubtedly, it is for the Government to be satisfied about existence of the dispute and the Government does appear to be satisfied. However, it would be open to the party impugning the reference that there was no material before the Government, and it would be open to the Tribunal to examine the question, but that does not mean that it can sit in appeal over the decision of the Government and come to the conclusion that there was no material before the Government.

The Hon'ble Supreme Court in **Ajaib Singh versus Sirhind Cooperative Marketing-cum-Processing Service Society Limited and Another, (1999) 6 SCC 82** has held that the provisions of Article 137 of Limitation Act, 1963 are not applicable to the proceedings under the Industrial Disputes Act. The Hon'ble Supreme Court has further held that it is not the function of the Court to prescribe limitation where the legislature in its wisdom had though it fit not to proscribe any period. Their Lordships of the Hon'ble Supreme Court have held as under:-

"It follows, therefore, that the provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay. The plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a merely

hypothetical defence. No reference to the Labour Court can be generally questioned on the ground of delay alone. Even in a case where the delay is shown to be existing, the tribunal, labour court or board, dealing with the case can appropriately mould the relief by declining to grant back wages to the work man till the date he raised the demand regarding his illegal retrenchment/termination or dismissal. The court may also in appropriate cases direct the payment of part of the back wages instead of full back wages. Reliance of the learned counsel for the respondent management on the Full Bench judgment of the Punjab and Haryana High Court in Ram Chander Morya v. State of Haryana is also of no help to him. In that case the High Court nowhere held that the provisions of Article of the Limitation Act were applicable in the proceedings under the Act. The Court specifically held "neither any limitation has been provided not any guidelines to determine as to what shall be the period of limitation in such cases". However, it went on further to say that

> **"reasonable time in the cases of labour for demand of reference or dispute by appropriate Government to labour tribunals will be five years after which the Government can refuse to make a reference on the ground of delay and laches if there is no explanation to the delay".**

We are of the opinion that the Punjab and Haryana High Court was not justified in prescribing the limitation for getting the reference made or an application under Section 33-C of the Act to be adjudicated. It is not the function of the court to

prescribe the limitation where the legislature in its wisdom had though it fit not to prescribe any period. The courts admittedly interpret law and do not make laws. Personal views of the Judges presiding over the Court cannot be stretched to authorize them to interpret law in such a manner which would amount to legislation intentionally left over by the legislature. The judgment of the Full Bench of the Punjab and Haryana High Court has completely ignored the object of the Act and various pronouncements of this Court as noted hereinabove and thus is not a good law on the point of the applicability of the period of limitation for the purpose of invoking the jurisdiction of the courts/boards and tribunals under the Act."

The Hon'ble Supreme Court in **Mahavir Singh Versus U.P. State Electricity Board and Others, (1999) 9 SCC 178** has held as under:-

"In our view, the order passed by the High Court cannot be sustained. The services of the appellant Chowkidar were terminated by Respondent 1, the Board. The date of termination is 12-11-1976. He raised an industrial dispute though belatedly in March, 1983. Ultimately reference was made by the appropriate Government on 17-4-1984. The Labour Court adjudicated the reference and took the view that the termination was illegal. But considering the delay in raising the dispute, as a package 50% back wages were directed to be granted to the appellant till reinstatement. Respondent 1 carried the matter in appeal before the High Court under Article 226 of the Constitution of India. The High

Court took the view that as the dispute was raised belatedly, the reference itself was incompetent though agreeing with the Labour Court that on merits the termination order could not be sustained and it was illegal. It is this order of the High Court which is in challenge before us.

Once the termination is held to be illegal, we fail to appreciate how the entire reference could have been rejected. The dispute lingered on for a number of years. That would not mean that the dispute had ceased to exist. It is, of course, true that belatedly the dispute was raised but that has been taken care of by the Labour Court by not awarding full back wages but only 50% of the back wages all throughout from the date of termination till reinstatement. Such order as passed by the Labour Court could not be said to be in any way uncalled for and illegal."

The Hon'ble Supreme Court has further held in **Sapan Kumar Pandit Versus U.P. State Electricity Board and Others, (2001) 6 SCC 222** that the opinion as to the existence of the dispute has to be formed by the Government alone and none else. Their Lordships of the Hon'ble Supreme Court have held as under:-

"The above section is almost in tune with Section 10 of the Industrial Disputes Act, 1947, and the difference between these two provisions does not relate to the points at issue in this case. Though no time-limit is fixed for making the reference for a dispute for adjudication, could any State Government revive a dispute which had submerged in stupor by long lapse of time and

rekindle by making a reference of it to adjudication? The words "at any time" as used in the section are prima facie indicator to a period without boundary. But such an interpretation making the power unending would be pedantic. There is inherent evidence in this sub-section itself to indicate that the time has some circumscription. The words "where the Government is of opinion that any industrial dispute exists or it apprehended" have to be read in conjunction with the words "at any time". They are, in a way, complementary to each other. The Government's power to refer an industrial dispute for adjudication has thus one limitation of time and that is, it can be done only so long as the dispute exists. In other words, the period envisaged by the enduring expression "at any time" terminates with the eclipse of the industrial dispute. It, therefore, means that if the dispute existed on the day when the reference was made by the Government, it is idle to ascertain the number of years which elapsed since the commencement of the dispute to determine whether the delay would have extinguished the power of the Government to make the reference.

Hence the real test is, was the industrial dispute in existence on the date of reference for adjudication? If the answer is in the negative then the Government's power to make a reference would have extinguished. On the other hand, if the answer is in positive terms the Government could have exercised the power whatever be the range of the period which elapsed since the inception of the dispute. That apart, a decision of

the Government in this regard cannot be listed (sic) on the possibility of what another party would think, whether any dispute existed or not. The section indicates that if in the opinion of the Government the dispute existed then the Government could make a reference. The only authority which can form such an opinion is the Government. If the Government decides to make the reference, there is a presumption that in the opinion of the Government, there existed such a dispute."

The Hon'ble Supreme Court has held in **U.P. State Electricity Board Versus Rajesh Kumar, (2003) 12 SCC 548** that facts and circumstances of each are to be considered in dealing with the claims and appropriate reliefs to be granted. Their Lordships of the Hon'ble Supreme Court have held as under:-

"Per contra, the learned counsel for the respondent workman in his arguments supported the impugned judgment. He submitted that the position of law, as regards making a reference of a dispute, is well settled by the decisions of this Court. According to the learned counsel, merely because there was delay in raising the dispute, reference itself was not incompetent; it is for the appropriate Government to make a reference on being satisfied as to the existence of the dispute; assuming that there is a delay in raising the dispute, that itself is not a ground to deny the relief to the workmen, but, depending on the facts and circumstances, the relief could be moulded. He added that this plea that the reference was not competent after delay of 19 years, was not raised before the Labour Court at all; for the first time it

was urged before the high Court. He also pointed out that the appellant being in possession of the original document, nothing prevented it from placing it before the Labour Court, if the list produced by the workmen was not correct or names of workmen in the list of employees were not found. He also submitted that the appellant having sought time, failed to produce evidence, as is evident from the orders of the Labour Court. Under the circumstances, according to the learned counsel no fault can be found with the impugned judgment.

The Labour Court, on the basis of the evidence on record, has recorded a finding of fact that the respondent workmen did work for 240 days. This conclusion is based on the evidence of the workmen and the list of 82 employees, which included the names of the respondent workmen. It is also on record that the correctness of this list was not challenged before the Labour Court and the management did not produce any contra-evidence or the original records which it possessed to deny the claim or contention of the workmen. Non-consideration of the evidence of the Executive Engineer who was examined on behalf of the appellant, in our view, did not affect the case in any way for the simple reason that he was not in service on the relevant date i.e. the dates on which the services of the respondent workmen were terminated. It is also clear from the impugned judgment that the point with regard to the stale claim of the workmen was not raised before the Labour Court. For the first time it was sought to be urged before the High Court. We may

also add that if the appellant was really aggrieved and serious as to the stale claim of the respondent workmen, it was open to the appellant management to question the very reference made by the State Government in the year 1997 itself. The validity of the reference was not questioned. Thereafter, the management participated in the proceedings before the Labour Court and suffered the award. The management further, unsuccessfully, challenged the award of the Labour Court before the High Court. From the award of the Labour Court it is clear that the relief granted to the workmen was only with regard to the reinstatement with continuity of service. The back wages were awarded only from the date of reference and not from the dates of termination of their services. This is how the Court has moulded the relief. We are told that when the proceedings were pending in the High Court, the respondent workmen are already reinstated.

It is also not disputed by the learned counsel for the parties that there is no period of limitation as is prescribed for the parties in making the reference. The facts and circumstances of each case are to be considered in dealing with the stale claims and appropriate reliefs are to be granted. We do not think it is necessary for us to examine the question of stale claims made by the learned counsel for the appellant in these cases, in the light of the facts narrated above and particularly, when the appellant did not challenge the order of reference made in the year 1997, at this stage. Thus looking from all angles, substantial justice is done in the matter. In this view, we decline to

interfere with the impugned judgment. Consequently, the appeals are dismissed. No costs."

Similarly, the Hon'ble Supreme Court has held in **Shahaji Versus Executive Engineer, PWD, (2005) 12 SCC 141** that even if there is delay, the Labour Court can always mould the relief to be granted to the workmen. The Hon'ble Supreme Court has further held that the burden to raise plea of delay is on the employer. In this judgment, the Hon'ble Supreme Court has noticed the earlier judgment rendered in **Ajaib Singh v. Sirhind Coop. Marketing-cum-Processing Service Society, (1999) 6 SCC 82.** Their Lordships have held as under:-

"We have heard counsel for the parties and we have also been taken through the judgments of this Court reported in Ajaib Singh v. Sirhind Coop. Marketing-cum-Processing Service Society, Nedungadi Bank Ltd. v. K.P. Madhavankutty and Sapan Kumar Pandit v. U.P. SEB. Having gone through the judgments we have no doubt that the judgment of this Court in Ajaib Singh case lays down the law correctly. In the instant case there was no ground of delay urged by the management. Moreover, even if there was delay in making the reference to the Labour Court, if it came to the conclusion that the termination was illegal, it could have suitably moulded the relief to be granted to the workman in view of the delay. In such cases the award of back wages may either be not permitted or curtailed. In Nedungadi Bank case what was challenged before the High Court was the order making the reference. That was not

a case where the Labour Court refused to entertain the dispute on the ground of delay. Having regard to the clear position in law we are left with no option but to allow this appeal and set aside the judgment and order of the High Court."

Their Lordships of the Hon'ble Supreme Court in latest judgment in **Asstt. Engineer, CAD, Kota Versus Dhan Kunwar, (2006) 5 SCC 481** has held that so far as delay in seeking the reference is concerned, no formula or universal application can be laid and it would depend on the facts of each individual case.

The Hon'ble Madras High Court has also held in **Cheran Transport Employees' Union, Kattor, Coimbatore Versus Govt. of Tamil Nadu and another, 1999 (6) SLR 579** that there is no prescribed limit for raising the dispute in the statute.

The Hon'ble Andhra Pradesh High Court has held in **A.P.S.R.T.C. Versus The Presiding Officer, Addl. Industrial Tribunal-cum-Additional Labour Court, Hyderabad and another, 1999 (7) SLR 375** that lapse of five years in approaching the Tribunal was not fatal.

The Hon'ble Punjab and Haryana High Court has held in **The Ambala Central Cooperative Bank Limited Versus State of Haryana, 2000 (2) SLR 754** that the relief under the Industrial Disputes Act cannot be denied to workman merely on the ground of delay.

The Division Bench of Hon'ble Calcutta High Court in **The Secretary (Policy) Regional Director (Food) Employees Association Versus Food Corporation of India & Ors., 2000 (5)**

SLR 728 has held that no period of limitation has been prescribed for raising an industrial dispute.

The Hon'ble Punjab and Haryana High Court has again held in **Pale Ram Versus State of Haryana and others, 2000 (8) SLR 750** that the delay cannot be the sole cause for rejecting the reference.

The Hon'ble Punjab and Haryana High Court in **Piara Singh Versus State of Haryana and others, 2001 (3) SLR 552** has held that the termination of services of workman were unjust in the matter where the Labour Court has answered the reference in negative being belated as the workman had raised the dispute after nine years.

The Division Bench of the Hon'ble Madhya Pradesh High Court in **Ramadhar Tiwari Versus Union of India and others, 2002 (8) SLR 681** has held that refusal to refer the dispute raised after five years was not proper.

The upshot of the above discussion is that the finding recorded by the Labour Court, Dharamshala in its award dated 23.3.2006 to the effect that there was delay and laches is palpably wrong and this Court is of the view that there was no delay in raising the dispute by the workman. The reference was to be answered on its merits.

Accordingly, this petition is allowed. The award dated 23.3.2006 is quashed and set aside. The matter is remanded back to the H.P. Industrial Tribunal-cum-Labour Court, Dharamshala to

adjudicate upon reference No.119/2003 afresh within a period of three months from today. There shall be no order as to costs.

June 20, 2007 **(Rajiv Sharma)**
(sck). **Judge**